

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

DAWSON V. ZACHRY CONSTR. CORP.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

DENNIS DAWSON, APPELLEE,
V.
ZACHRY CONSTRUCTION CORP., APPELLANT.

Filed February 22, 2011. No. A-10-612.

Appeal from the Workers' Compensation Court. Affirmed.

Tiernan T. Siems and Heather B. Veik, of Erickson & Sederstrom, P.C., for appellant.

Eric B. Brown, of Atwood, Holsten, Brown & Deaver, P.C., L.L.O., for appellee.

IRWIN, CARLSON, and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Zachry Construction Corp. (Zachry) appeals the decision of a three-judge review panel of the Nebraska Workers' Compensation Court, which affirmed the decision of the trial court, determining that Dennis Dawson was entitled to disability benefits for an injury that occurred within the course and scope of his employment with Zachry. On appeal, Zachry challenges the trial court's findings that Dawson suffered a compensable injury, that Dawson was temporarily totally disabled through June 2008, that Dawson is now permanently totally disabled, and that Dawson is entitled to compensation for past and future medical expenses. For the reasons set forth below, we affirm.

II. BACKGROUND

On September 8, 2006, Dawson was working as a welder and a pipefitter for Zachry. While at work, Dawson was crawling through a condenser when his foot became entangled in a fire blanket and he fell over sideways. Dawson struck his left knee on a piece of metal and

immediately felt pain. Dawson reported the incident to his foreman and was taken to first aid, where he put ice on his left knee for approximately 1 hour. Dawson then returned to work and completed his duties.

Dawson continued working for Zachry as a welder and a pipefitter after the incident on September 8, 2006; however, he continued to feel pain in his knee. He indicated that his left knee “steadily became worse” after the accident. He reported to his supervisors at Zachry “at least once a week” that his left knee was not improving and that he was experiencing pain. In December 2006, he began to experience pain and swelling in his right knee as well.

On January 2, 2007, Zachry sent Dawson to see Dr. Gary Enszt. Dr. Enszt noted that Dawson was walking with a limp and diagnosed him as suffering from a knee strain.

In February 2007, Dawson made an appointment with Dr. Richard Rattay, an orthopedic surgeon. Dr. Rattay diagnosed Dawson as suffering from cartilage tears at the left knee with a medial meniscal tear. Dr. Rattay also indicated that Dawson’s right knee was compensating significantly due to the injury to his left knee and that such compensation had created significant pain and problems in the right knee. Dr. Rattay began treating Dawson for these injuries and ultimately concluded that Dawson required left and right knee replacement surgeries. As a result of the treatment he was receiving for his knees, Dawson’s last day of work at Zachry was March 9, 2007.

On September 5, 2008, Dawson filed a petition alleging that he had been injured in the scope and course of his employment with Zachry. In the petition, Dawson alleged that he had experienced a loss of earning capacity as a result of his injuries and he requested permanent disability benefits and payment of his medical bills.

On September 8, 2009, a trial was held. At trial, Dawson testified regarding the accident and his resulting injuries. Dawson testified that his condition had improved since undergoing the knee replacement surgeries, but that he could no longer work as a welder or a pipefitter due to his physical restrictions.

In addition to Dawson’s testimony, both parties offered numerous exhibits, including Dawson’s medical records from various doctors and deposition testimony from Dr. Rattay. While we have reviewed this voluminous medical evidence in its entirety, we do not detail such evidence here. Rather, we simply note that there was conflicting evidence presented concerning the degree of Dawson’s impairment, the cause of Dawson’s knee problems, and Dawson’s ability to return to any type of employment. We will set forth the specific facts as presented at the trial as necessary in our analysis below.

After the trial, the trial court found that the injuries Dawson sustained in the September 2006 accident necessitated the knee replacement surgeries. The trial court found that Dawson was temporarily totally disabled from March 12, 2007, through June 11, 2008, when he had fully recovered from the second knee replacement surgery, and that after June 11, 2008, Dawson was permanently totally disabled. The court awarded Dawson disability benefits and compensation for past and future medical expenses.

Zachry appealed the award of the trial court to the Workers’ Compensation Court review panel. The review panel unanimously affirmed the decision of the trial court. Zachry now appeals to this court.

III. ASSIGNMENTS OF ERROR

On appeal, Zachry assigns four errors. Zachry alleges that the review panel erred in affirming the trial court's findings that (1) Dawson is entitled to compensation for the injury he sustained in September 2006; (2) Dawson was temporarily totally disabled from March 12, 2007, through June 11, 2008; (3) Dawson is now permanently totally disabled; and (4) Dawson is entitled to compensation for past and future medical expenses.

IV. ANALYSIS

1. STANDARD OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008); *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

2. COMPENSABLE INJURY

Zachry alleges that Dawson did not present sufficient evidence to demonstrate that the injury he sustained on September 8, 2006, entitled him to compensation under the Nebraska Workers' Compensation Act, because Dawson failed to prove that there was a causal connection between the injuries he suffered in the accident and his resulting disability and treatment, particularly the left and right knee replacement surgeries. Specifically, Zachry alleges in its brief that Dawson merely sprained his left knee as a result of the accident and that Dawson's knee replacement surgeries were necessitated by a preexisting condition, rather than by the injury he sustained in September 2006.

Under the Nebraska Workers' Compensation Act, a claimant is entitled to an award for a work-related injury and disability if the claimant shows, by a preponderance of the evidence, that he or she sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Moreover, to recover workers' compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Olivotto v. DeMarco Bros. Co.*, 273 Neb. 672, 732 N.W.2d 354 (2007).

When we consider the evidence presented at trial in the light most favorable to Dawson, we conclude that there is sufficient evidence to demonstrate that Dawson's disability and his treatment, including the left and right knee replacement surgeries, were causally related to the

injuries Dawson sustained on September 8, 2006. Dr. Rattay, the orthopedic surgeon who performed the knee replacement surgeries, testified in his deposition that Dawson's knee problems and the eventual surgeries to correct those problems were directly related to the injury he suffered in the accident. Dr. Rattay testified that Dawson suffered an acute injury to both knees in the accident. He also testified that the pain in the left knee after the accident "accelerated wear and pain and symptoms in the right knee." Dr. Rattay opined that the injuries Dawson sustained in the accident on September 8, 2006, necessitated both knee replacement surgeries.

Despite the testimony of Dr. Rattay, Zachry alleges that Dawson had a preexisting condition in his knees and that this condition, rather than the injuries incurred in the accident, necessitated the knee replacement surgeries. There is evidence in the record to suggest that prior to September 8, 2006, Dawson suffered from arthritis in his knees; however, such evidence indicates that the accident accelerated and exacerbated this condition.

In a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability, or that the employment injury aggravated, accelerated, or inflamed the preexisting condition. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

In May 2006, approximately 4 months prior to the accident, Dawson complained of knee pain to his family physician, who performed x rays of Dawson's knees and recommended further testing if the pain persisted. Dawson did not seek further treatment and testified at trial that the knee pain had subsided after only 48 hours. Dawson testified that he did not have any other problems with his knees prior to September 2006. In fact, in August 2006, immediately prior to his employment with Zachry, Dawson underwent and passed a physical which required bending, squatting, and lifting. Medical records authored by Dr. Rattay indicated that Dawson's preexisting condition was "mild" in nature and that the accident caused additional damage to both of Dawson's knees and accelerated the wear on the knees.

Taken as a whole, we find the evidence presented at trial sufficient to establish that the injuries Dawson incurred in the accident accelerated and exacerbated Dawson's preexisting knee problems and, thus, accelerated and exacerbated his need for extensive treatment and ultimately knee replacement surgery.

Zachry also alleges that the causal connection between Dawson's knee replacement surgeries and the accident is based solely on the testimony of Dr. Rattay and that such testimony lacks foundation and is not reliable. In making its argument, Zachry points to the statements and medical records of other doctors who opined that the knee replacement surgeries were not necessitated by the injuries incurred in the accident and that such surgeries were not necessary at all. Essentially, Zachry's argument is about the credibility of the various doctors who examined and treated Dawson.

The trial court was faced with conflicting opinions regarding causation. The trial court is entitled to accept the opinion of one expert over another. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997). As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Id.* When the record in a workers' compensation case presents conflicting

medical testimony, an appellate court will not substitute its judgment for that of the compensation court. *Lowe v. Drivers Mgmt., Inc.*, 274 Neb. 732, 743 N.W.2d 82 (2007).

The trial court accepted Dr. Rattay's opinion establishing causation, finding, "the Court has determined that it should give in this instance greater weight to the opinion of the surgeon who actually visually examined [Dawson's knees]." We conclude that the trial court was not clearly wrong in relying on Dr. Rattay's opinion to establish causation.

The evidence presented at trial demonstrated that Dawson's disability and his treatment, including the left and right knee replacement surgeries, were causally related to the injuries Dawson sustained on September 8, 2006. Zachry's arguments to the contrary are without merit.

3. TEMPORARY DISABILITY

Zachry asserts that the trial court erred in finding that Dawson was temporarily totally disabled from March 12, 2007, through June 11, 2008.

Temporary disability within the meaning of the Nebraska Workers' Compensation Act is the period during which the employee is submitting to treatment, is convalescing, is suffering from the injury, and is unable to work because of the accident. *Godsey v. Casey's General Stores*, 15 Neb. App. 854, 738 N.W.2d 863 (2007). Zachry does not dispute that from March 12, 2007, through June 11, 2008, Dawson was submitting to treatment, convalescing, suffering from his injuries, and unable to work. Rather, Zachry focuses its argument on whether Dawson's treatment and inability to work during this time was a result of the injuries incurred in the September 2006 accident. Zachry again argues that Dawson's treatment, including the knee replacement surgeries, was necessitated by a preexisting condition, rather than by the injury he sustained on September 8, 2006.

As we discussed more thoroughly above, the evidence presented at trial demonstrated that the injuries Dawson sustained in the accident were causally related to his treatment, including the left and right knee replacement surgeries. As such, Zachry's argument that the trial court erred in awarding temporary disability benefits because Dawson's disability was not related to the accident is without merit.

4. PERMANENT DISABILITY

Zachry asserts that the trial court erred in concluding that Dawson is permanently and totally disabled. Specifically, Zachry argues that the trial court erred in its findings concerning Dawson's physical abilities and in its finding that Cedar Point, Kansas, was the relevant labor market for determining whether Dawson had a permanent loss of earning power.

Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Id.* Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Id.*

The compensation court can look at an employee's work-related injury, as well as his or her existing physical and academic limitations, in determining whether the employee is

permanently disabled. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). The test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). Once the cause of a disability has been established, the compensation court may consider the testimony of the claimant in determining the extent of the claimant's disability. *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990).

Zachry alleges that the trial court erred in its findings concerning Dawson's physical abilities. The trial court relied on Dawson's self-report of his abilities in determining Dawson's physical restrictions as a result of the injuries incurred in his accident. The court looked to Dawson's statements during a vocational interview on August 5, 2009, and to Dawson's testimony at trial.

During the vocational interview, Dawson indicated that he would be able to work an 8-hour day at a job that allowed him to sit most of the day as long as he was permitted to stand and walk at periodic intervals. Dawson indicated that he might be able to work an 8-hour day at a job that required a great deal of standing or walking; however, he indicated that his knees often swell and become tight after standing or walking for too long. Dawson indicated that he has difficulty climbing and balancing and that he is unable to kneel, squat, crawl, and push or pull. Dawson reported that he is able to lift and carry up to 10 to 15 pounds. At trial, Dawson testified that he would no longer be able to work as a welder or a pipefitter because these jobs require bending, stooping, and kneeling. Dawson also indicated his desire to return to some type of work.

Based on our review of the record, we do not find that the trial court erred in relying on Dawson's self-report of his physical abilities and limitations nor do we find that the trial court erred in its ultimate findings concerning Dawson's physical abilities and limitations as a result of the injuries he incurred in the accident.

Zachry also alleges that the trial court erred in finding that Cedar Point and those communities within 50 miles of Cedar Point were the relevant labor markets for determining whether Dawson had a permanent loss of earning power. Zachry argues that because Dawson typically traveled great distances to facilitate his employment as a welder and pipefitter, the relevant labor market should include a much more expansive geographical area.

Evidence presented at trial revealed that Dawson had lived in Cedar Point for a number of years and that he intended to reside in that area indefinitely. The evidence also revealed that Dawson is currently unable to continue to work as a welder or a pipefitter as a result of his injuries. There was also evidence that Dawson is currently unable to drive for long periods of time. As such, even though Dawson did travel for his employment prior to the accident, it is clear that he can no longer travel long distances and that he can no longer work in the same field. We conclude that the trial court did not err in limiting the relevant labor market to Cedar Point and the surrounding communities.

Upon our review of the record, we conclude that the trial court did not err in its findings concerning Dawson's physical abilities and in its finding that Cedar Point was the relevant labor market for determining whether Dawson had a permanent loss of earning power. We affirm the order of the trial court finding that Dawson is permanently and totally disabled.

5. PAST AND FUTURE MEDICAL BENEFITS

Zachry asserts that the trial court erred in awarding Dawson compensation for past and future medical expenses for treatment related to the accident. Zachry again focuses its argument on its claim that Dawson's treatment, including the knee replacement surgeries, was necessitated by a preexisting condition, rather than by the injury he sustained on September 8, 2006. Zachry also reasserts its argument that the testimony and evidence provided by Dr. Rattay was based on inaccurate information and lacked foundation. Zachry argues that the trial court's award of future medical benefits was based entirely on the opinion of Dr. Rattay that Dawson will require additional surgeries on his knees in the future and that other doctors provided differing opinions on this topic.

As we stated above, the evidence presented at trial demonstrated that the injuries Dawson sustained in the accident were causally related to his treatment, including the left and right knee replacement surgeries. As such, Zachry's argument that the trial court erred in awarding past and future medical expenses because Dawson's disability was not related to the accident is without merit. Moreover, the trial court accepted Dr. Rattay's opinion regarding Dawson's future medical care, and we cannot say that the trial court was clearly wrong in relying on Dr. Rattay's opinion on this issue. This assignment of error has no merit.

V. CONCLUSION

We find no merit to Zachry's assignments of error. There was sufficient evidence presented to demonstrate that the injuries Dawson sustained on September 8, 2006, were casually related to his disability and to his treatment, including the left and right knee replacement surgeries. In addition, there was sufficient evidence to support the trial court's conclusion that Dawson is permanently and totally disabled. Accordingly, we affirm the review panel's affirmance of the trial court's determination.

AFFIRMED.